

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 24, 2007

STATE OF TENNESSEE v. JOHN LYNCH

**Direct Appeal from the Circuit Court for Marshall County
No. 17142 Robert Crigler, Judge**

No. M2006-02158-CCA-R3-PC - Filed January 9, 2008

The Petitioner, John Lynch, pled guilty to violating the Habitual Motor Vehicle Offender Act, and the trial court sentenced him to three years in confinement. The Petitioner filed a petition for post-conviction relief, which the court denied. He now appeals, challenging the standard for post-conviction relief in Tennessee and claiming he received the ineffective assistance of counsel. After a thorough review of the record and the applicable law, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J.C. McLIN, J., joined.

Hershell D. Koger, Pulaski, Tennessee, for the Appellant, John Edward Lynch.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; Chuck Crawford, District Attorney General; Weakley E. Barnard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In 2005, the Petitioner pled guilty to violating the Habitual Motor Vehicle Offender Act ("HMVO"). The Petitioner was represented by three different attorneys for his general sessions hearing, plea acceptance hearing, and sentencing hearing. One of the attorneys was the Public Defender and the other two were employed in the office of the Public Defender. At the post-conviction hearing, the following evidence was presented: the Petitioner testified that he spent about

fifteen minutes total with all three of the attorneys assigned to him. The Petitioner claimed that Donna Hargrove, his attorney for the general sessions hearing, promised him that “work release would be no problem.” The Petitioner wished to continue working throughout his sentence so his family would not lose their house. The Petitioner also said that Hargrove and Jack Dearing, the Petitioner’s attorney for the plea acceptance hearing, “coerced [him] into signing” the guilty plea, and there was never a discussion of waiving the right to appeal. According to the Petitioner, he told one of his attorneys (it is unclear from his testimony which attorney) that he did not wish to sign a waiver of appeal but signed it because the attorney said, “you ain’t losing, you’re going home to your house and wife today.” The Petitioner testified that he did not give any of his attorneys names or information of witnesses because “they never asked.”

Janice Turpin, the Petitioner’s fiancée, testified that she attended the sentencing hearing and was prepared to testify for the Petitioner, but no one from Petitioner’s legal team ever contacted her. Turpin said that both Hargrove and Dearing told the Petitioner he would receive work release. Turpin said Hargrove promised the Petitioner, “If you sign this you could either get probation or work release.” Turpin also testified that the Petitioner told Hargrove and Dearing that he knew a few people who could testify as witnesses, but neither counsel asked for witness information because court was called back into session.

Steve Adams, the Petitioner’s employer, testified that he would have been a witness for the Petitioner if one of the Petitioner’s attorneys would have contacted him. Adams also said he would have helped drive the Petitioner to and from work if the Petitioner had received work release.

David Church, the Petitioner’s neighbor, testified that he was never contacted by the Petitioner’s attorneys or the Petitioner about being a witness at the Petitioner’s sentencing hearing. Church also stated he did not have a telephone until closely before the post-conviction hearing.

Earl Black, who restored old cars with the Petitioner, testified that the Petitioner did not drink alcohol much any more and that the Petitioner never asked him to testify.

Michael Merchant, who had the Petitioner fix his family’s cars, testified that he was never approached by anyone about testifying at the sentencing hearing.

Donna Hargrove testified that she had represented the Petitioner over the past decade and that she represented him in the General Sessions Court. She said, “[The Petitioner] readily admitted he was guilty,” and that his only issue was that he was working and did not want to return to jail. Hargrove testified that, when the State offered a sentence of three years at thirty-five percent, she presented the offer to the Petitioner and told him it was a “decent” deal. She said she also told him several times that he would not get work release or alternative sentencing because of his criminal record. Hargrove explained, “I never left any impression that he would get work release,” and she told the Petitioner he needed to prepare to return to the penitentiary. Hargrove also testified that Petitioner never told her about any witnesses. She stated that she knew the HMVO order in this case had the wrong name listed in one sentence, but the Petitioner did not care about the error, and he

signed it willingly. “We showed [David R. Ledford’s name] to him. . . . We thought it was a little unusual. He didn’t have an issue with that. He agreed that he is the one who signed [the Order] and that he was declared [a habitual motor vehicle offender].” Furthermore, Hargrove stated that she did not discuss strategy and witnesses for the sentencing hearing with the Petitioner because she did not know if she would represent him on that charge.

Andrew “Jack” Jackson Dearing, III, testified that he spoke with the Defendant around two to four times while representing him. Additionally, he said the Petitioner knew of the clerical error, had it explained to him, and signed the HMVO order with the wrong name on it. Dearing testified that he explained the guilty plea petition to the Petitioner and told him what to expect at the sentencing hearing. Dearing did not remember the Petitioner telling him about any witnesses or any mental difficulties.

Michael J. Collins, the Petitioner’s attorney for the sentencing hearing, testified that he consulted with Dearing about the case and spoke with the Petitioner before the hearing. Collins said the Petitioner never said he had witnesses he would like to present, and no one else discussed potential witnesses with him.

On rebuttal, the Petitioner testified that he learned about the error on his HMVO order while in the penitentiary, not from Hargrove or Dearing.

The post-conviction court issued a written order delineating its credibility findings, ruling against the Petitioner, and finding the sentence lawful:

4. . . . The Court finds the testimony of the Honorable Donna Hargrove and Jack Dearing to be credible and the testimony of the [Petitioner] to be completely unbelievable. Given the Defendant’s prior criminal history alone he would have known he would not receive alternative sentencing. The Court accredits to Mr. Dearing’s testimony that the [Petitioner] pled guilty without any agreement as to sentence and asked for a sentencing hearing in order to stay out on bond as long as possible before being incarcerated. Furthermore, the [Petitioner] testified under oath at his plea acceptance hearing twice that no promises had been made to him to induce his guilty plea that were not announced at that time. When the [Petitioner] was cross-examined on this point at the post-conviction hearing, he initially evaded answering the State’s questions and ultimately feigned lapse of memory. The Court finds that the [Petitioner] pled guilty knowingly, understandingly, and voluntarily.

5. Similarly, the Court finds credible . . . Mike Collins[’s] testimony that the [Petitioner] knowingly, voluntarily, and understandingly waived his right to appeal and also, that had the [Petitioner] told him of witnesses to use at the sentencing hearing he would have interviewed them and called them as witnesses if appropriate. Furthermore, the [Petitioner] called those witnesses at the post-conviction hearing and the Court finds that their testimony would not change the decision to impose a

three year sentence, range II and deny alternative sentencing.

6. The [Petitioner] waived his right to contest the sentence imposed by waiving his appeal. Nevertheless, the Court makes the further finding that the sentence imposed was lawful, and in retrospect finds that in reviewing the [Petitioner's] record the sentence was, if anything, too lenient.

It is from this judgment that the Petitioner now appeals.

II. Analysis

The Petitioner raises two issues on appeal: (1) that the Tennessee standard of proof at a post-conviction hearing is unconstitutional; and (2) that he received the ineffective assistance of counsel. In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

A. Standard of Proof

The Petitioner alleges that the standard of proof for a post-conviction hearing should be "reasonable probability that the result would have been different" and not "clear and convincing evidence." The State argues that this Court and the Tennessee Supreme Court have upheld and applied the statute requiring clear and convincing evidence to sustain petition for post-conviction relief filed on or after May 10, 1995. We agree with the State.

Tennessee Code Annotated section 40-30-110(f) prescribes that, for a post-conviction hearing, "[t]he petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived." The Tennessee Supreme Court has upheld and applied this statute in numerous cases, and we are bound by the rulings of the Supreme Court. *See, e.g., Wallace v. State*, 121 S.W.3d 652, 656 (Tenn. 2003); *Nichols v. State*, 90 S.W.3d 576, 586 (Tenn. 2002). The Petitioner is not entitled to relief on this issue.

B. Ineffective Assistance of Counsel

The Petitioner raises four specific instances in which he claims counsel were ineffective: (1) Counsel were ineffective at the pre-hearing and preparation phase; (2) Counsel were ineffective at the sentencing hearing by failing to call witnesses and present proof; (3) Counsel was ineffective by giving improper advice on pleas and appeals; and (4) Counsel was ineffective at the sentencing hearing by failing to object to the misapplication of the law by the trial court.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel,

‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Pre-Hearing and Preparation Phase

The Petitioner claims that Hargrove and Dearing were ineffective in the pre-hearing and preparation phase of the trial because they did not know the HMVO order had another individual’s name on it and that, if he had been informed of that error, the Petitioner would not have pled guilty. The State claims that the Petitioner signed the HMVO order with the clerical error and that the order clearly referred to the Petitioner. Additionally, the State argues that, pursuant to Tennessee Rule 36 of Criminal Procedure, the Petitioner should have filed a motion with the court to amend the order instead of raising this issue as a post-conviction claim. We agree with the State. The HMVO order has the Petitioner’s name on the top of the page and in the first paragraph. Additionally, the Petitioner signed the order after his attorneys showed him the error. Such an error is clerical in nature, and it should be corrected on remand through an amended judgment. In Tennessee, courts may “correct mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission.” Tenn. R. Crim. P. 36. The Petitioner has not shown that Counsel were ineffective or that he was prejudiced. Therefore, he is not entitled to relief on this issue.

2. Witnesses at Sentencing Hearing

The Petitioner argues that Counsel failed to call witnesses and present proof at the sentencing hearing, and thereby breached the duty to investigate. The State counters that one of the attorneys instructed the Petitioner to gather his witnesses, the Petitioner did not gather his witnesses, and the Petitioner never gave Counsel a witness list. In Tennessee, the petitioner must meet a rigorous test to prove that Counsel’s failure to present a witness was prejudicial:

[W]hen a petitioner contends that trial counsel failed to discover, interview, or

present witnesses in support of his defense, . . . the petitioner [must prove] that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.

State v. Black, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Focusing on the materiality of the witness, the post-conviction court in this case found the Petitioner "completely unbelievable" and that the other witnesses's testimony "would not change the decision to impose a three year sentence, range II, and deny alternative sentencing." We agree with the post-conviction court. We fail to see how the Petitioner was prejudiced by his attorneys' failure to call certain witnesses on his behalf. The Petitioner has not proven that the testimony addressing his sobriety and ability to work outweighs his more than twenty prior convictions. Additionally, Counsel were not ineffective for not presenting witnesses because the Petitioner did not provide witness information to his attorneys. The Petitioner is not entitled to relief on this issue.

3. Guilty Plea and Right to Appeal

The Petitioner alleges that Dearing was ineffective for not explaining the consequences of the Petitioner's guilty plea, including that he was waiving his right to appeal. The State argues that the trial court explained the consequences of pleading guilty to the Petitioner, and the Petitioner knowingly, intelligently, and voluntarily entered the guilty plea and accepted its consequences.

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); see also *Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). The circumstances include:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing *Caudill v. Jago*, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." *Id.*

After a thorough review of the record from the plea acceptance hearing, and considering the post-conviction court's finding of credibility in favor of Counsel and against the Petitioner, we conclude that the Petitioner voluntarily and intelligently pled guilty. The trial court questioned the Petitioner at length about his guilty plea pursuant to Tennessee Criminal Procedure Rule 11. The Petitioner appropriately, voluntarily, and intelligently responded to the court's questions, and the trial court accepted the guilty plea based on the Petitioner's responses. Specific to the Petitioner's claim that he did not know he waived his appeal, we note that he answered "yes" when the court asked him, "Do you understand by pleading guilty there will be no further trial as to your guilt or innocence. So that by pleading guilty you are waiving your right to trial, jury trial, and to appeal the issue of your guilt or innocence?" Additionally, as part of his guilty plea, the Petitioner signed a form that waived his right to appeal. We conclude that the Petitioner voluntarily and intelligently entered into his guilty plea, and, as such, the Petitioner has failed to prove that Counsel's representation of him was deficient. Further, with respect to the Petitioner's right to directly appeal his sentence, the record reflects that he told his Counsel he did not wish to exercise that right. Specifically, at the end of the sentencing hearing, Counsel said, "I have explained to [the Petitioner his] right to appeal the court's ruling on the sentence. After speaking to him he indicated to me that he does not wish to appeal." The post-conviction court accredited the testimony of Counsel and not that of the Petitioner. As such, the Petitioner is not entitled to relief on this issue.

4. Misapplication of the Law at Sentencing Hearing

The Petitioner's final argument is that Counsel failed to object to the trial court's misstatement of the law with regards to alternative sentencing options for a habitual motor vehicle offender. The State argues that the trial court had other well-articulated reasons for sentencing the Petitioner to jail rather than work release. We agree with the State.

When sentencing the Petitioner, the trial court had some discussion as to whether an individual convicted under the Habitual Motor Vehicle Offender Act could receive alternative sentencing. It ultimately sentenced the Petitioner to three years in prison after considering the Petitioner's numerous prior convictions and the need to protect the community. At the hearing, the court said:

I will, I guess, consider him for community corrections, but I will deny it for the reasons of his – he has shown he is not amenable to correction. . . .

The criminal record, social history and that granting community corrections would not serve the interest of the public, as well as I think it is contrary to the intention of the habitual offender statute to grant community corrections or work release. . . .

I find that no mitigating factors apply.

I find that the enhancing factor of history of prior criminal convictions is significant. His record covers – established in pages 10 through 15, five pages, in the presentence report. He has felony convictions in addition to those necessary to establish him as a Range II offender.

We conclude that the trial court appropriately sentenced the Petitioner. The trial court erred by stating or believing that a habitual vehicle offender could not receive an alternative sentence, such error is harmless given the Petitioner’s lengthy criminal record, which is an enhancement factor. Because the error is harmless, the Petitioner has not met the burden of proving that he suffered prejudice from Counsel’s failure to object. As such, the Petitioner is not entitled to relief on this issue.

III. Conclusion

We conclude that the Petitioner’s claims that the “clear and convincing” standard of Tennessee Code Annotated § 40-30-110(f) is unconstitutional and that he received ineffective assistance of counsel are both without merit. Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE